Social Security Advisory Board

400 Virginia Avenue, SW ∗ Suite 625 ∗ Washington, DC ∗ 20024
Tel: (202) 475-7700 ∗ Fax: (202) 475-7715 ∗ www.ssab.gov

October 24, 2005

The Honorable
Jo Anne B. Barnhart
Commissioner of Social Security
500 E Street SW
8th Floor
Washington, D.C. 20224

Dear Commissioner Barnhart:

On behalf of the Social Security Advisory Board, I am submitting the enclosed document. It presents the Board's comments on the notice of proposed rulemaking on "Administrative Review Process for Adjudicating Initial Disability Claims" that you published in the *Federal Register* on July 27, 2005 at pages 43590ff.

As you know, the Board has carefully studied the disability adjudication process for a number of years. We have published several reports recommending ways in which that process can be made more timely and consistent. The report on the disability programs we issued in January 2001 was subtitled "The Need for Fundamental Change." We are pleased that you have undertaken the challenge of bringing about that necessary and fundamental change. We believe that these proposed regulations, together with the eDib initiative, represent very significant steps in the right direction.

In our comments we point out the need for careful, flexible, and well resourced implementation of the revised process, and we suggest a few areas where some clarification or adjustments would be desirable.

We look forward to seeing the final regulations and to working with you and the Social Security Administration's dedicated staff as we continue our reviews of the program and the implementation of the new adjudication process.

Sincerely yours,

Hal Daub
Chairman

cc: Mary Chatel
ODISP Office of Regulations (by email and fax)

Proposed Regulations to Restructure the Disability Adjudication Process
Comments of the Social Security Advisory Board
October 2005

Since its creation by legislation enacted in 1994, the Social Security Advisory Board has devoted great attention to the Social Security disability programs from both operational and policy perspectives. We are encouraged that the current Commissioner of Social Security has made the reform of that program one of the highest priority objectives of her tenure in office, and we believe that commitment is reflected both in the resources she has devoted to converting the largely paper-bound disability claims processes to a modern electronic system, and by her attempt through these regulations to restructure the adjudication process itself in ways that will improve quality and consistency and reduce the inordinate delays that are inherent in the current system. At the same time, we are very much aware that the serious problems and backlogs affecting this program will not and cannot be magically erased by issuing regulations, however well thought out. The many details of implementation will vitally affect the real-world impact of the regulations, and a commitment of adequate resources at each stage of the process is crucial. Our comments therefore will of necessity go somewhat beyond the specifics of the proposed regulations to also discuss issues which the agency must be prepared to address if the regulations are to have their intended results.

We would note first of all that the disability program administered by the Social Security Administration (SSA) is:

- massive, handling more than two and a half million new claims and half a million eligibility reviews each year;
- programmatically complicated, requiring difficult decisions based on detailed evaluations of medical, vocational, and legal issues;
- organizationally complex, involving multiple steps some of which are carried out by the agency's field offices, others by State employees in the various Disability Determination Services, and still others in an appeals process involving about 1,000 Administrative Law Judges who operate under special rules designed to assure their decisional independence; and
- immensely important to meeting the basic income needs of millions of America's most vulnerable citizens – those who have severely disabling conditions that prevent them from working.

The proposed regulations do not change these realities nor the basic obligation of the agency to assure that the disparate parts of the program work together to give prompt, efficient, and accurate service to the public. The agency's ability to meet this obligation is greatly aided by the fact that the vast majority of those who work in this program whether in SSA operations at the field office level or elsewhere, in the State Disability Determination Services, or in the administrative appeals process are talented, hard-working, dedicated individuals. Nonetheless, it is essential that the program administrators continually monitor the operations of the program, identify any problem areas that may arise, and seek and utilize the authority to deal with those problems.

Federal Reviewing Official

Under current regulations, as they apply in most States, individuals who are denied benefits on the basis of the initial decision by a State Disability Determination Service may ask for a reconsideration of that decision. That reconsideration is carried out by different decision makers in the same State Disability Determination Service. Nationally about 15 percent of claims appealed to this reconsideration step are then allowed. The proposed regulations would eliminate this DDS reconsideration step and instead provide that appeals from initial DDS-level denials would be handled by a Federal reviewing official. According to the explanatory material accompanying the proposed regulations, the agency intends to use attorneys at this stage of the appeals process; however, the proposed regulations themselves do not mandate this.

The Board believes that the elimination of DDS level reconsideration and the establishment of a Federal reviewing official are fundamentally reasonable changes which provide an opportunity to address several long-standing issues with the disability adjudication process. However, it is crucial that this position be implemented properly and with adequate resources as it otherwise has a potential to become yet another bottleneck in the process.

In August 1998, in one of our earliest reports on the disability program, we noted that the administrative structures of Social Security's disability programs are fragmented in a way that makes consistent and equitable decision making difficult to achieve. Initial decisions are made by over 50 Disability Determination Services administered by the States, the District of Columbia, and other jurisdictions. Appeals are handled at the reconsideration level by these same entities and at the hearings level by approximately 1,000 Administrative Law Judges in over 100 hearing offices. The reviewing official position is an opportunity to have the first level of appeal handled by federally trained and supervised individuals who can assure that agency policies are applied uniformly to all claimants. To achieve this objective, however, it is essential that the assignment of cases to reviewing officials not be geographically based.

The entire disability adjudication structure is currently in a state of stress with over 2 million claims a year, over half a million claims at any one time pending in the State DDSs, and the number of claims awaiting an ALJ hearing in excess of 700,000 and growing rapidly. Without reform, this situation will only worsen as the Baby-Boom generation moves more and more into its disability prone years. At present, the most serious situation is at the ALJ-hearing level where processing is often measured in years rather than days. Since the new procedures proposed by the regulations are to be phased in very slowly, attention needs to be focused on improvements to the management of the hearings process in addition to what can be accomplished by the regulations, and this is an area on which the Board is currently focusing its attention. However, for the longer run, the proper implementation of the reviewing official position is critical to addressing the need to rationalize the ALJ hearing process. A consultant report on the administrative appeals process that the Board commissioned in 2002, identified inadequately developed case files as a major reason for the chronic backlogs at the ALJ hearings level. That

report recommended the creation of a new position, similar in many respects to the new reviewing official position in the proposed regulations. The primary responsibility of that new position would be to assure that the case record is adequately developed. The proposed regulations do indicate that claimants may submit additional evidence with the request for review by the reviewing official and that the reviewing official may obtain needed evidence from other sources or may remand a case to the DDS to obtain additional evidence. The Board is concerned, however, that neither the regulations themselves nor the explanatory material reflect a clear commitment to giving the reviewing official the responsibility (and resources) to assure that there is an adequately developed record. While this should, of course, also be an objective at the DDS level, the existing reality is that a substantial part of the workload of hearings offices and Administrative Law Judges is that of perfecting the claims record. This is a highly inefficient use of the most expensive part of the administrative appeals process. The reviewing official should be empowered and required to assure that the record is adequately developed and organized to fully justify either an allowance or a denial. If the result is a denial and a hearing is requested, there should rarely be need for substantial further case development prior to the hearing. As appropriate to the needs of each case, the reviewing official should work with the claimant and representative to assure that all relevant evidence has been obtained. The regulations should authorize and encourage the use by the reviewing officials of subpoenas in cases where providers are uncooperative in providing evidence on a timely basis. While the Board agrees that the regulations should, as they do, permit remands from the reviewing official to the DDS, that should be viewed as an unusual and extraordinary event. Any significant level of remand activity would surely be an indication that the new process has failed.

If the new disability process is to succeed, improvements will be needed at each level, and it is not reasonable to expect that improvements can be made if inadequate resources are provided. For the majority of DDSs, the elimination of the reconsideration will free some resources although other features of the regulations such as the quick decision process and the establishment of Federal standards for expert qualifications and fee levels may increase resource needs. The success of the reviewing official stage will be far more likely if the product from the DDS level is improved through more attention to in-line quality reviews, increased training, and substantial improvements in the adequacy of decision rationales. As past history has demonstrated, these crucial elements tend to suffer if resources are inadequate.

One of the driving motivations for the proposed changes in the adjudication process is the need to make correct decisions sooner so that claimants do not spend long months and even years awaiting a final determination as to their eligibility. The Board is aware that differences of opinion exist as to whether the reviewing official position should be decisional or should simply be viewed as a developmental stage for perfecting the record and, in appropriate cases, recommending a decision to the Administrative Law Judge. We agree with the approach taken in the proposed regulations to make this a decisional step. The nature of the disability program, as currently defined, ensures that there will still be close-call cases that will ultimately need to be resolved at a face-to-face hearing where credibility of the claimant's allegations and the opinion of expert witnesses

can be assessed. However, many cases now proceed to a hearing that could have been decided without the need for one if they had been adequately developed at an earlier stage in the process. Where claims can be allowed at the reviewing official stage, there clearly will be no need to utilize the costly ALJ hearing process. Even where claims are denied by the reviewing official, the rate of appeal should be less if that stage of the process can achieve a reputation for fair and accurate decisions by individuals well trained in disability policy and on the basis of a fully developed record. Because of the better development and clearer decisional rationale at the reviewing official stage, it should be possible to handle those cases that do proceed to the hearings stage far more expeditiously than is now the case.

The proposed regulations require that the reviewing official's decision include a discussion of the reasons for agreeing or disagreeing with the initial decision by the DDS. Similarly, the regulations would require ALJ decisions to include a discussion of the reasons for agreeing or disagreeing with the reviewing official decision. Many of the interested parties with whom the Board has spoken have expressed concern that this provision might interfere with the principle that each level of administrative decision making should represent an independent weighing of all the evidence and not be bound by the conclusions of earlier stages. This concern has been especially raised with respect to the application of the rule to the ALJ stage of the process.

The Board understands the importance of assuring that the decision at each level represents the independent assessment of the decision maker on the basis that all the evidence available supports an allowance or a denial. But the Board does not think that a requirement to explain the reasons for agreement or disagreement with a prior decision in any way prevents such independent decision making. While courts are required to review the decisions of Administrative Law Judges on a substantial evidence basis, the standard the ALJ must apply is that of the preponderance or weight of the evidence as is also true for decision makers at earlier levels. In our studies of the disability program over the years, we have found a widespread and corrosive belief in each level of review that other levels are applying agency policy differently and inappropriately. Having each decision maker explain the reasons for agreement or disagreement with prior decisions should provide the agency the information needed to determine whether these beliefs are accurate and, if they are, to undertake the necessary training, policy clarification, or other measures needed to remedy the situation.

The explanatory material accompanying the proposed regulations indicates an intent to use attorneys for the reviewing official position, however, the regulations themselves are silent on this issue. The Board has heard an array of opinions on this issue. Some feel that the task could be adequately, or perhaps better, handled by drawing on non-attorneys with substantial experience in the disability process such as DDS hearing examiners. Others express concern that the use of attorneys will further undermine the already badly backlogged ALJ hearing process by attracting its most talented staff attorneys to this new position. Still others agree strongly with the proposal to use attorneys for the reviewing official and express concern about not including that requirement in the regulations itself.

The Board sees merit in each of these arguments, but, on balance, agrees with the approach taken in the proposal provided that it is carefully implemented. We believe the Commissioner's proposal sets an appropriate standard but also leaves sufficient flexibility to deal with the realities of implementation. We strongly endorse the goal of having the reviewing official be a lawyer who is also well trained in the application of SSA disability policy. With such qualifications, the reviewing official should be able to assure that the case file is fully developed and well organized and that the claimant and any subsequent reviewers will have confidence that the agency's decision satisfies the claimant's due process rights. This approach should also produce improved uniformity in decision making.

If the reviewing official approach is ultimately successful, it should become the final decision point for the great majority of cases which are appealed from the initial DDS level and should also be able to assure that cases appealed further are essentially hearing-ready. That result will only be achieved if the reviewing officials are both well trained in agency disability policy and well grounded in what is necessary to assure that the case file and decisions will be legally sufficient. However, this is a new process and one that is being implemented at a point where the agency, particularly at the ALJ hearing level, is under great stress. While we support the approach of using an attorney, we think it wise for the regulations to leave some flexibility. If the agency should find itself unable to staff the position fully with well-trained attorneys without undermining its ability to manage existing caseloads, it might need to modify its plan, perhaps by temporarily using other individuals with appropriate skill sets or, perhaps, by adopting a team approach that includes both attorneys and non-attorneys.

We found some confusion to exist among the parties who spoke with us about the role of medical experts in the reviewing official process. It appears to us that the regulations only require that the reviewing official "consult" with experts in certain cases and not that the experts have the role of co-decision makers. The regulations do, however, seem somewhat ambiguous on this point and should be clarified. We also believe that the regulations should recognize that in many cases it will be as important, or even more important, to obtain the opinion of a vocational experts. Substantively, we see no reason why a well trained reviewing official should not be entrusted with making the decision. Moreover, we would suggest that the agency revisit the requirement that reviewing officers obtain a medical expert evaluation in all cases involving either a reversal of the DDS decision or the submission of new evidence. Even though the electronic disability file will facilitate such evaluations, there will be both a dollar and, probably, processing time cost involved. Evaluations by medical or vocational experts will undoubtedly be important in many, but not necessarily all, such cases, but it seems to us the agency should leave itself the flexibility to address this through training and internal administrative procedures rather than establishing a universal mandate in regulations.

Deadlines for Submission of New Evidence/Closing the Record

The proposed regulations include several provisions relating to when evidence can be submitted. Under present processes, evidence can essentially be submitted at any time so long as it is relevant to the question of whether the claimant was disabled at any point prior to the issuance of the hearing decision. Even after the hearing decision, claims can be remanded from the appeals council or the courts for the consideration of new evidence. In eliminating the Appeals Council step of the process, the proposed regulations effectively close the record (for purposes of administrative review) as of the point at which the Administrative Law Judge decision is issued. The regulations also generally require that all evidence be submitted no later than 20 days before the hearing. Notice of the hearing must be given to the claimant at least 45 days prior to the hearing. Additional evidence can be submitted after the deadline if it relates to a worsening of the claimant's condition after the deadline or if the claimant can establish good cause for not submitting it within the deadline.

In its discussions with interested parties, the Board heard stronger differences of opinion on this issue than on any other part of the proposed regulations. Some expressed concerns that claimants would be denied the opportunity to present crucial evidence because of the difficulties often encountered in getting providers to produce evidence in a timely manner. This concern applies most strongly to claimants who are unrepresented or who seek representation shortly before the date of the hearing. Others we spoke with felt strongly that there is a need to make sure that all evidence is received in advance of the hearing so that there is time to convert it to an electronic format and so that the Administrative Law Judge can properly prepare for the conduct of the hearing. Those who favored the new rules felt that ALJs would properly exercise their discretion to allow late submissions where good cause existed and would use their subpoena power if evidence providers were recalcitrant. Opponents of the new deadlines expressed concerns that some ALJs might arbitrarily refuse to accept late evidence even where good cause existed.

The Board has, in the past, expressed its concern over some of the incentives created by the current system of allowing evidence to be added at any point. The establishment of a deadline for evidence submission such as 10 or 20 days before the scheduled hearing could serve to create a more orderly process with a more complete record for consideration at the hearing. Although late submission of evidence is apparently not a major factor in hearing postponements, it does contribute to that problem and to the need for supplemental hearings and other post-hearing delays. We think that some of the concerns that we have heard about the deadlines would be particularly applicable in the present somewhat chaotic hearing system, but may have less force under the overall adjudication structure that is being proposed. If, as discussed earlier, the new reviewing official position is appropriately implemented to carry out the function of assuring that the case record is fully developed, there should be few instances where any significant amount of new evidence needs to be introduced before the ALJ hearing. However, there does seem to be merit to the argument that a deadline of 20 days before the hearing combined with a notice of the hearing as short as 45 days in advance might

frequently leave inadequate time when it is necessary to obtain medical evidence of the claimant's current condition. It might be more reasonable to provide more advance notice, perhaps something like 75 days.

The concern that ALJs might not appropriately apply the good cause rules for the late submission of evidence also has merit. This cuts both ways. Little will be accomplished by the new deadlines if ALJs apply them in such way that findings of good cause are essentially automatic, but inappropriate denials could result from failure to find good cause where it actually exists. This is an area (among many others) where the agency needs to provide significant levels of training as to how the new regulations should be applied and to assure that this issue is monitored in the reviews by the Decision Review Board.

Reopening of Claims

The proposed regulations significantly limit the circumstances under which the agency can reopen and revise a determination that has become final and, in particular, would prohibit such reopening if the only basis for reopening is new evidence. The Board heard significant opposition to this change on the basis that it is only used in limited circumstances to correct decisions that were quite clearly erroneous. One example is a decision based on the adjudicator's judgment that a condition will last less than 12 months that is subsequently shown to have continued far beyond that time. In discussing this proposal, the agency indicates that it was made in order "to foster the finality of our decision making process." While this is a desirable objective, it is not clear that this change contributes much to achieving that objective. We believe the agency should reexamine this issue before depriving itself of the flexibility to use this discretionary and non reviewable tool for correcting obvious mistakes.

Elimination of the Appeals Council/Decision Review Board

The proposed regulations would eliminate the Appeals Council and establish a Decision Review Board. Although superficially similar entities, this is a very major change in the adjudicative structure. The Appeals Council functions primarily as the final step in the administrative appeals process. In 2004, it received over 90,000 requests for review, allowed about 2,000, and remanded about 25,000. Under the proposed regulations, claimants who are not satisfied with an ALJ decision would not have the right to request review by the new Decision Review Board except in very limited circumstances, primarily where the ALJ dismissed their claim without a hearing. The Decision Review Board would primarily review cases (both allowances and denials) that are selected for review on the basis of a profile of error prone cases or that involve such issues as new or problematic policies.

The elimination of the right of claimants to request an administrative review of the hearings decision was criticized by many of those with whom the Board spoke. Two basic concerns were raised: the inability of claimants to seek administrative correction of erroneous hearing decisions and the potential impact on the Federal courts if the

elimination of Appeals Council review results in substantially increased filings for review by Federal District Courts. These are understandable concerns, but we think they tend to arise, to a significant extent, from an assumption that the general approach to adjudication proposed by the regulations will not have much impact. In implementing the new regulations, the agency does need to monitor these concerns. However, the Board has long recommended the need to rethink the role of the Appeals Council, which seems to add little value relative to the resources it consumes. If these resources are applied to making improvements in the process at earlier stages and to a better system for identifying and resolving policy issues at all levels, the result could and should be one in which the need for further review beyond the ALJ hearing level is substantially reduced.

In our reports on the disability program, the Board has previously urged consideration of a separate Social Security court that could provide more expeditious review of disability appeals, eliminate the impact of such cases on the District Court workloads, and produce more uniform application of disability policy throughout the Nation. Such a change is, of course, beyond the scope of regulations, but this remains an avenue that should be considered, particularly if the new adjudication process does not result in a decreased incidence of appeals beyond the hearing level.

Quick Disability Determinations

The proposed regulations would establish a quick decision process so that individuals who clearly meet the requirements for eligibility can have their claims processed on an expedited basis. While recognizing that this is, in many cases, already done on an informal basis, the Board agrees that it is appropriate to establish this as a program requirement and set up formal rules governing its operation. However, it is important that those rules be carefully implemented and monitored to assure that they achieve the intended results.

Under the proposal, State agencies would create special units, staffed with experienced disability examiners whose sole focus will be on making efficient, accurate and timely determinations. Quick decisions are defined as initial claims for which SSA has identified a diagnosis as one that "reflects a high degree of probability that you will be found disabled." Identification of these cases will involve a not-yet-developed predictive modeling tool. It is not clear at this time how much experience and depth of program knowledge will be required of the examiners in the quick decision units. Moreover, it is not known how many cases will be identified as meeting the criteria and, consequently, whether there be sufficient cases to require a specialized unit in all DDSs. Unless the agency has developed workload estimates that provide a clear rationale for the universal requirement to establish a separate unit, the regulations should leave flexibility.

The requirement that these staffs must be experienced examiners also raises questions. By definition, these should be the simplest of claims. A possible precedent is the former Senior Attorney project that utilized experienced attorneys who focused exclusively on probable allowances – cases which tended to be less complex. The result was their skills and abilities were not available to assist the ALJs in the more complex

cases. Hearing offices lost the ability to effectively manage their resources and workload. If the quick decision process inflexibly requires the use of more experienced examiners, DDSs could lose the ability to assign the most difficult cases to their best and brightest.

Like SSA, State agencies are able to promote staff in a career ladder-type setting once the individual shows mastery of the work. If these examiners are required to do less complicated work – which by definition these cases should be – then they could be perceived by State personnel departments to be moving down the career ladder with resulting unintended consequences. In order to avoid this, SSA would need to be prepared to address salary and skill sets and work with each DDS parent agency and State personnel department. In the Advisory Board's report, *Agenda for Social Security: Challenges for the New Congress and the New Administration (*February 2001) we stated SSA should require States to follow specific *guidelines* relating to educational requirements, salaries, training, etc. This proposed regulation does not address any of these issues and thus the likelihood of this new requirement for a specialized unit of experienced examiners may be premature. Without guidance and rationale this proposal will greatly curtail the DDS Administrator's ability to manage staff resources in an efficient fashion. We would suggest that this requirement be changed to allow for more flexibility, as long as the DDS is able to fulfill the quick decision performance standards and until such time as SSA is able to address the broader issues we raised in our February 2001 report.

The proposed regulation specifically states that the disability prototype tests which include the single decision maker (SDM) position will cease to exist and does not provide any explanation for this decision. If the requirement to staff the quick decision units with experienced examiners remains, then the single decision maker concept seems like an excellent model to use in these units, and one that could resolve the previously discussed classification dilemma. SDMs are experienced examiners who would make effective use of medical expertise, as appropriate, in the adjudication of cases which have already been determined to have a high probability of allowance. While a final report on the Prototype was never released, anecdotal information indicated that the SDM process contributed significantly to improved initial determinations – the stated goal of the proposed regulations.

The proposed regulations provide that the (experienced) examiner in the quick decision unit will refer all claims to a medical or psychological expert. This expert will "verify the particular diagnosis that is the basis of the claim." This seems to imply a lesser standard for determining disability for quick decisions. Disability determinations are not made on the basis of diagnosis alone, but are based on securing medical evidence which documents the signs, symptoms and laboratory findings that support a diagnosis. (Even the recent ALS listing, which requires minimal documentation and is frequently cited as a model for the quick decision process, still requires that the diagnosis be supported by objective medical findings.) If the intent of the regulations is to require approval by a medical expert, we suggest that the language be changed to simply state

that the medical expert must sign off on the determination, thus signifying concurrence with the allowance.

As stated previously, quick decisions are defined as those cases where the diagnosis indicates a high likelihood of allowance. It would be useful to have more details relative to the actual predictive formula that will be used to identify these cases. However, we assume that it will include such items as date last insured, age, education, work experience, etc and will not be solely based on a sampling of diagnoses that are usually allowed. In the case of Title II claims, the requirement of the 5-month waiting period adds a complication to the quick decision process. Unless the claimant has completed (or nearly completed) the waiting period, there is no real benefit to the quick decision process and it is not clear that giving such a claimant priority processing over other claimants would be appropriate.

It is important that the predictive tool be designed to reflect demographic and disease prevalence differences across the country and not merely aggregate national data and apply selection criteria uniformly to all cases. The sensitivity and precision of the selection criteria will directly impact the success of the quick disability determination process as well as the DDS's ability to meet the rigorous processing time standards that SSA is proposing for these cases. We suggest that once the predictive tool is developed, that it be tested across the country, not just in one region, in order to assure that it does select cases accurately.

Other Operational Issues

Currently, the SSI program has provisions for field office and DDS presumptive disability determinations. The field office authority is limited to a set of specific impairments. However, the DDS can presumptively determine that "there is a strong likelihood that the claim will be allowed on formal determination." As of August 2005, the DDS presumptive disability usage rate ranged from 8.5 percent to just over 40 percent across the regions. These data are essentially unchanged over the last several years. It is not clear how the quick decision determination process will interact with the Title XVI presumptive disability determination process. But clearly, if the concern is to assure that those individuals who are obviously disabled are allowed as soon as possible, then SSA needs to evaluate the presumptive disability process, a process designed to assist the most vulnerable population, and strengthen it. The standardized algorithm of the predictive modeling tool will certainly help to bring about equity in expedited decision making across the country, but this needs to be done in tandem with a reassessment of the presumptive disability process. We urge SSA to look closely at the current presumptive disability process and examine its approach to making the right decision as early as possible in a more holistic fashion.

Performance Standards

We believe that all levels of the adjudication process should be held accountable for customer service. However, the proposed regulations do not seem to hold all parts of the organization to such standards, especially in the area of processing time. We recognize that it may be undesirable to establish rigid processing time standards within the regulation, but the agency should commit itself to administratively setting processing timelines at each level and making those goals—along with data showing whether they are being met—publicly available.

Field Office Standards

The proposed regulations indicate SSA will identify, through the use of a predictive modeling tool, which cases should be selected for the quick disability determination process. As described in the supplemental information section, this tool will identify individuals who meet the definition of disability and have readily available medical evidence. Using data entered into the electronic case processing system by the field office, an alert will be generated to the DDS. The effectiveness of the case selection process is dependent on the quality of the information elicited at the initial interview and on the data entered into system by the claims representative. As part of the new in-line and end-of-line quality assurance processes, data should be collected that tracks the accuracy of the case selection process and how well the field offices capture the critical information needed for this screening step. In addition, data relative to any impacts on processing time should be kept. Field offices should be held accountable for accurately identifying and timely transferring the cases to the DDS.

Even apart from the quick decision process, the role of the field office is critical in dealing with disability claims generally. To the extent that such claims are appropriately handled at that level, the goal of more accurate and expeditious processing at the DDS level will be enhanced. The new in-line quality review systems should include reviews of field office actions with respect to disability claims. Beyond that, consideration should be given to increasing field office skills in handling those claims through additional training and possibly the establishment in field offices of a disability specialist who could be a resource for other employees, provide training, and perform quality review.

DDS Standards

The proposed regulations provide that DDSs must process 98 percent of the quick disability determination claims that SSA refers to them within 20 days. There is no explanation provided to support these particular standards, but it must be based on an assumption that the predictive tool will be extraordinarily accurate, with little margin for error on the part of the field office or the model. SSA will monitor the processing time on a quarterly basis, but there is no indication that they will monitor the selection criteria. If a DDS "falls below the quick disability determination processing standard" for two consecutive quarters, SSA will notify the State that it has substantially failed to comply with the standards. States are then at risk of losing this workload. SSA proposes that it

will not provide any technical performance support for those DDSs failing to meet these standards prior to proposing that the DDS is in noncompliance. As SSA notes, this is a departure from the procedures to provide performance and technical support to DDSs that fall into "substantial failure." (20 CFR 404.1670).

Neither the supplemental information nor the proposed regulations themselves provide any explanation for this strict provision. Such inflexible terms can set up a situation where the States could be tempted to manipulate the quick decision workload in order to meet these requirements and maintain staffing and funding levels.

Since the overall intention is to phase-in the new processes over a period of years, it would be prudent to test this new process, gain some actual experience with the predictive tool and the workload in order to establish appropriate and defensible performance standards and staffing requirements. At a minimum, SSA should reassess the proposed goals and the refusal to provide performance support. We believe that it would be more appropriate to establish a threshold processing time and quality standard that would trigger a corrective action plan. Until the agency has experience with this concept, it is unwise to establish overly-rigid standards that might prove unenforceable and thus undermine the credibility of all standards.

The performance of the DDS in this area is not entirely within their control, and there are several other players in the process, including the experts from the national network. If this expert fails to "verify" the diagnosis, this will impact the DDS's ability to meet the 98 percent/20 day standard and also the standards that will be applied to processing of cases other than quick decisions. To measure only the performance of one organization seems at odds with an integrated quality and performance measurement system. We believe clarification is needed as to the roles and interrelationships of the Federal Expert Unit and the National Network of Medical and Vocational Experts. We will discuss these at more length later in our comments, but, in any case, it will be important to establish and monitor the performance of those entities.

Quality Review Standards

The proposed regulations provide that quick disability decisions will be subjected to quality review, and we agree that this is essential. However, there is no discussion of the processing time standards that the reviewing component must meet. Even if the DDS adjudicates the cases well within the 20 day time frame, several additional days can be added if the case sits in a Federal reviewing queue. The quality assurance process will need to be structured to move cases quickly and efficiently. It seems prudent to establish a target goal of just a few days for the review, but this should be tested as well.

Reviewing Official Standards

The proposed regulations are silent as to processing time and quality standards for the reviewing official. We would urge SSA to incorporate a commitment to accountability into the regulations, just as has been done for the quick decisions, but

without setting rigid regulatory timeframes. Establishing flexible rules now will allow SSA to gain experience with this process and at the same time reinforce that this is not business as usual. It is imperative that SSA demonstrate that this time they are serious about service delivery at all levels of the organization.

As described in the proposed regulation, the reviewing official's duties are comprised of case review, some development of the record and consultation with an expert, and then writing a decision. It appears that this is not that different from the current reconsideration process – apart from the requirement to write a more detailed decision rationale. On average, DDSs adjudicate reconsideration claims in 68 days (SSA data for the quarter ending August 2005). As previously indicated, we believe that the primary responsibility of this position should be to assure that the case is fully developed and that the regulations should reflect a clear commitment to giving the reviewing official the necessary resources to do this. Thus, it would seem reasonable to expect that the RO may take a little longer to process cases than in the DDS. Target and threshold performance goals for the reviewing official should be established and tested, along with quality standards that include accuracy, cost per case and remand rates.

Administrative Law Judge Standards

Several of the parties that the Advisory Board met with raised the issue of how to hold ALJs accountable for issuing timely decisions. A concern was expressed that under the proposed regulations it may be even more difficult to receive a timely decision. Because ALJ decisions will be directly reviewed by the District Court, it is quite possible that SSA will experience unintended consequences of the ALJs holding more formal hearings as well as issuing more detailed but fewer decisions.

While it is important to assure that claimants receive a hearing decision that represents the ALJ's independent best judgment as to how agency policy applies to the particular facts of the case, it is also a claimant's right to get a decision hearing decision within a reasonable time. SSA needs to use the implementation of its revised adjudication process as an opportunity for re-crafting how work is done in the appeals process and to develop standards and clearer role and responsibilities. If the reviewing official position is responsible for developing the record, clarifying and/or narrowing the issues and facilitating the hearings process, then the scope of work that is left to the ALJ can be refined. They would receive a properly and completely developed case and could generally be seen to have fulfilled the duty to assure that the record is fully developed. The ALJ could then concentrate more fully on writing decisions that may be produced much more timely.

Decision Review Board Standards

Many of the problems within the current OHA process can, we believe, be traced back to a lack of accountability and to insufficient institutional measures to assure timely and efficient customer service. As it establishes the new Decision Review Board, the agency should establish standards that will assure that it will not become a backlog point.

The supplemental information section states that SSA intends to screen every Administrative Law Judge decision, using predictive screening tools and individual case record reviews to identify cases for referral to the Decision Review Board. The caseload will be comprised of favorable and unfavorable ALJ decisions that are likely to be error-prone and it will generally select and review an equal share of each type of case. Based on this description it is difficult to estimate the expected workload volume. It is also stated that the DRB will be a smaller review body than the current Appeals Council. We caution that SSA should remember the lessons learned from prior unchecked growth in the AC workload. Without performance goals, there is a substantial danger that backlogs will grow and caseloads will not be well managed.

Proposed section 405.410 states that, if a claim is selected for DRB review, the notice of that selection will be furnished to the claimant at the same time that that ALJ's decision is released. The DRB has 90 days to review the ALJ's decision and if they fail to complete the review, the ALJ's decision will become final. (The Appeals Council currently has 60 days to finish its review of Own Motion cases.) While this establishes an outside limit, it does not really speak to a standard of acceptable performance which, presumably should be much shorter. Since these are pre-effectuation reviews, an allowance decision could be delayed up to another 90 days, and this should be the exception, not the norm. Otherwise, it is highly likely that the processing time savings that are being culled from other parts of the adjudication process may be spent in this new review process.

Training

In our February 2001 report, *Agenda for Social Security: Challenges for the New Administration*, we emphasized that the Federal-State relationship needs to be strengthened and enforced in several areas. Primary among these is the need to require specific training requirements for disability examiners and consultants. Three years later this sentiment was echoed in GAO's January 2004 report, *Human Capital in the DDSs*. At that time, nearly one-half of DDS Directors reported that a large fraction of their examining staff need additional training in some critical decision making areas. However, this training has failed to take place because large workload levels have imposed a substantial barrier to carrying out training programs.

We are heartened to note that the introduction to the proposed regulations indicates that SSA plans to clarify its authority to require <u>all</u> individuals who are part of the adjudicative process to participate in SSA training programs. And we are especially pleased to note that this includes the medical and vocational experts. The latter group, especially those hired at the OHA level, are not included in any formal training program.

It is important to note that a critical part of training is an adequate mentoring program. Newly-hired experts will need "hands-on" case review support and the opportunity for "staffing of cases." Adjudicating disability cases is very different from the actual practice of medicine. And medical schools do not include this in their curriculum. A new skill must be acquired in order to be able to effectively transfer

medical knowledge to the disability program. Disability adjudication is not about treatment or second guessing a treating source, it is about understanding the rules of adjudication, determining severity and developing functional capacity assessments—again something that doctors are not trained to do. In the DDSs and in the regional office medical staffs, a great deal of review, discussion and mentoring occur before a doctor is allowed to sign-off on cases. Training and mentoring of experts who only testify at ALJ hearings will be a challenge. However, it is critical that these individuals receive feedback on their role and duties in the adjudication process.

In addition, we strongly urge SSA to undertake a comprehensive training effort on the administrative and procedural changes that come out of the final regulation. This is especially important for the ALJs. They will need to become comfortable with and understand how to determine "good cause," have a good grasp on when to grant it and when it is totally inappropriate. This is too critical a concept to allow each ALJ to interpret single-handedly without any national guidance.

While the regulations indicate an intent to require training at all levels, it will be important to the success of the revised process that improved levels of training actually occur. We hope that SSA's 2006 Performance Plan and the 2006-2008 Strategic Plans will be revised to reflect a more detailed commitment (and commensurate resources) to this activity. We urge SSA to break the pattern of cutting training when resources get tight or workloads begin to grow.

Rationales and Notices in the DDS Process

The supplemental information states that the DDS will be required to document and explain the basis of the determination made in every claim it adjudicates. SSA also specifies that the written notice of the initial determination will *articulate* the specific reasons for the determination. "Articulate" is defined as (to) "explain in clear and understandable language the specific basis for the determination or decision, including an analysis of the relevant evidence in the record supporting the determination or decision."

One of the underpinnings of the Redesign Initiative was the requirement that the DDSs clearly explain the key decision points in an understandable rationale and notice to the claimant. The reason for this was the belief that if the determination is well-explained, then claimants who are denied will understand why they were denied and will not be as likely to request reconsideration or a hearing. Several pilot projects were undertaken, none of which were very successful. These experiences showed that it is difficult to write thorough and well rationalized case explanations. However, if this is important to the success of this new process, then an investment in training and in developing the tools that are essential for guiding the adjudication thought process must be made. We urge SSA to begin this process change by taking steps to really improve the efficiency of the "thinking" part of the adjudication process.

Federal Expert Unit

The Federal Expert Unit (FEU) will "organize and maintain" a national network comprised of medical, psychological and vocational experts who will provide expertise to State agencies, reviewing officials, ALJs and the Decision Review Board (DRB). The goal of assuring a breadth of experts who are accessible across the adjudication community is clearly desirable. The vision of how this unit will function is not clear from the proposed regulation, thus making it difficult to determine the actual scope of duties that the unit will have. It appears that the role of the FEU could range from being intricately involved in daily workload management to one of being a more passive oversight group. Nevertheless, it is seems that a key role for the FEU should include assuring that the experts are well trained in the disability program and that appropriate in-line quality review is carried out.

The supplemental information states that "we want to ensure that the right set of medical eyes reviews medical records and answers questions…" We assume that this goal and the FEU structure will not impose barriers to obtaining consultations in an efficient manner. The national network and the required use of these experts should not override the best judgment of the disability examiner or the ALJ as to which type of review/advice is needed. Any attempts to mandate that cases be reviewed only by specialists could result in unnecessary expense and time delays. This could also have a negative impact on the quick disability determination process.

We have heard from SSA that the intent is to secure access to a wide range of highly skilled specialists throughout the country. The working premise is that through eDib and the internet, an expert at, for example, the Cleveland Clinic can review a complex case for the California DDS and offer an opinion on severity and perhaps functional capacity. While this opinion can be extremely valuable, obtaining it can be logistically difficult. Remote, off hours and impersonal consultations will eliminate the ability of the adjudicator to discuss or "staff" cases and may discourage collaboration with the "best" expert. We would envision that this type of situation would be rare, but a prudent and practical approach to developing and implementing the network should be taken.

It is our understanding that the scheduling process for hearings is one of the most difficult aspects of preparing for a hearing. Expanding the pool of experts from which the hearing office can draw should be helpful. The supplemental information specifically states that it is the Federal expert unit that will make available to the ALJs and the DRB the needed expertise. Experts will be assigned to these cases by the FEU on a rotational basis, taking into account the need to have a locally based expert. While the FEU, as a source of specialized expertise that is not available locally, could help to improve and expedite hearings, requiring that unit to play a role in scheduling local experts for several hundred thousand hearings annually could have the opposite effect.

National Network of Medical and Vocational Experts

The proposed regulations provide that it is SSA's responsibility to provide expertise needed to adjudicate a claim if such expertise is not available to the State. The agency plans to facilitate that by establishing a national network of experts. DDS medical consultants (employees and contractors) can join the network, but only if they possess the required credentials. For those DDS experts who are in the network, they will be paid at a federally determined rate for their services and the DDS will be reimbursed for the cost of those services. If a DDS uses an expert not affiliated with the network, SSA will not reimburse the DDS for those services.

We agree that establishing a more uniform minimum standard for the qualifications of the expert network is a positive step. It will be imperative to the success of this effort that SSA work closely with the DDS's parent agencies and human resource departments on how to transition to the new arrangement. However, since SSA pays the full cost of operating the DDSs, the proposal to not pay for those who do not meet standards, if applied to current employees, appears to be an indirect mandate to terminate those individuals from participation in the program. If that is the intent, it should be stated directly.

As we noted previously in these comments and earlier reports, the Social Security Advisory Board believes that SSA needs to exercise its regulatory authority by establishing guidelines for education and training. The proposal states that experts under contract to the DDS must meet the qualifications effective with the publication of the final regulation or upon publication of the qualification, whichever is later, if they are to be affiliated with the national network and receive the federally established pay scale. The NPRM does not clearly specify if this rule covers only consultants used in the DDS as case reviewers *or* if it is designed to cover the equally critical consultative examination contractors. The cross reference regarding the national network (405.15) to another section that addresses the *purchase of medical and other services* (416.919k) makes this very unclear and needs to be resolved in the final regulation.

Several of the groups with whom we spoke believed that there were significant drawbacks to the proposed Federal Expert Unit and the national network concept. The certification process was specifically cited as an area of concern. We are aware that the Institute of Medicine is developing credentials for the expert network and we anxiously await their recommendation. We believe that these credentials should place great weight on disability program knowledge and experience in regulatory adjudication. Recent or current practice experience is very valuable, but the final criteria should not preclude the ability to use highly skilled retired physicians and psychologists. For physicians with busy practices, SSA must look at the opportunity cost for these experts to forego earnings from their practice in order to consult with SSA. Unless there is sufficient funding for the hourly rate to reach into the hundreds of dollars, it seems unwise to insist on using only practicing experts. Affiliation with medical and vocational Centers of Excellence which could provide interdisciplinary assessments, similar to SSA's arrangement with the

Association of University Centers on Disabilities, appears to us be a viable option for staffing the networks.

The regulations would also impose a qualification requirement on the "vocational experts" that the DDSs use. It is not clear if this meant to include the DDS position of "vocational specialist." (Currently there are 32 vocational specialists working in the DDSs.) These individuals are usually promoted to this position from the examiner ranks. Some may have had formal training in vocational rehabilitation or counseling, but not necessarily. Clearly, there is wide variation in the skills and, as a result in the use of vocational specialists. Application of vocational principles is a difficult area and one in which most examiners are weak. SSA should take this opportunity to define not only the credentials for this position, but also when and how the vocational specialist should be utilized. The qualification standards for vocational experts, whether in the DDS or otherwise, should address the need for competency in evaluating the critical factors that comprise functional assessments and how they relate to functional capacity. In addition, SSA has been working on alternatives to the out-of-date *Dictionary of Occupational Titles* for several years with little apparent progress. The disability program struggles to make determinations relative to transferable skills and availability of jobs using obsolete data. The requirement for credentials is important, but it does not obviate SSA's responsibility to provide adjudicative staff with proper tools and references.

The proposed regulations do not provide any level of detail regarding how the agency plans to formulate the expert fee schedule. We suggest that this schedule reflect locality, scarcity of the specialty, credentials, including relevant advanced degrees and diplomas, local State requirements and board certification and experience. While this would result in varying rates across the country, it would avoid dramatically underpaying or overpaying and thus maximize medical resources.

Quality Assurance in the Disability Program

SSA has long been lacking an effective mechanism to provide information that would allow it to understand the degree to which its own policies and procedures contribute to inconsistent decision making. Without such data the agency cannot assess the true integrity and fairness of its decisions and thus is not in full compliance with its own stewardship responsibilities. Any concerted effort on the part of SSA to remedy this is most welcomed.

The proposed regulations provide that the present regionally based quality review of DDS claims will be replaced by a centrally-managed quality assurance system that will do end-of-line reviews. The proposal also states that the mandated pre-effectuation reviews of initial DDS claims, quick decisions and reviewing official decisions will continue. It is not clear if this latter review will be done in the centrally-managed units or in a regionally–managed setting. Moving to a centralized review could help to address long-standing concerns about the apparent lack of national consistency.

Disability Policy Council

Although not specifically included in the regulatory changes, the supplemental material promises the establishment of a Disability Policy Council. The Board views this as a very positive step. In our previous reports, we have cited the need for strengthening the agency's policy infrastructure so as to develop clear and unified disability policy. The establishment of the Disability Policy Council is a positive step especially since the disability program continues to be fragmented across several components.

Adequate Resources, Communication, Evaluation, and Administrative Support

The proposed regulations represent a response to a dysfunctional adjudication system that, despite the best intentions and hard work of thousands of Federal and State employees, exhibits unexplained inconsistency, has huge backlogs, and subjects many claimants to intolerable delays in reaching a final decision on their claims and appeals. The Board is generally supportive of the approach to restructuring that system reflected in the new regulations. However, we wish to emphasize that merely changing the steps in the process will not in itself make a substantial difference. Even if, in the long-run, the new process combined with the move to far greater use of electronic systems has the potential to reduce the need for resources, growing caseloads may offset much of any such savings. In the near term, moreover, the agency will have the daunting task of implementing a new adjudication system while continuing to operate an existing system that is nearly overwhelmed by its huge caseload and backlogs. The agency must seek and the Congress must provide adequate resources to meet the needs of both the evolving and existing systems, or the result will be an exercise in "rearranging the deck chairs."

Beyond financial resources, however, the success or failure of the new adjudication structure will depend on how well the implementation is managed.

The agency needs to undertake stronger measures to assure that the responsibilities of the Disability Determination Services are not frustrated by inappropriate State actions such as hiring freezes, limitations on overtime, or organizational arrangements which prevent necessary Federal oversight of State agency operations. These are issues that need urgently to be addressed in the implementation of the proposed regulation.

It is essential that good workload data and other management information be collected as the new processes are rolled out and that that information be used internally and made available publicly so that the new procedures can be carefully evaluated on an ongoing basis. In our discussions with interested parties, we found widely divergent viewpoints as to whether some of the past experiments with changed processes had succeeded or failed. Unfortunately, the agency had not produced the data and evaluations that would help to resolve those questions.

In our 2001 report, *Agenda for Social Security*, we pointed out that the Social Security Administration has a strong institutional resistance to open discussion of the

agency's problems. In implementing the new regulations, the agency must encourage prompt, frank, and open communication among all levels of the agency and the State DDSs of problems that are encountered. It is highly unlikely that the implementation of such significant changes to the complex SSA adjudication process will not reveal a number of areas where adjustments need to be made. Those issues need to be identified and seriously considered. As necessary, mid-course corrections will have to be made. In undertaking changes of this magnitude, thorough, open, and honest communications are crucial.

Successful implementation will also require that SSA management not only listen to but actively address problems that are brought to their attention by sources within and outside the agency. In talking with various parties about the proposed regulations, the Board repeatedly heard allegations that agency management has not been supportive of measures that might have lessened some of the problems the regulations seek to remedy. For example, we heard that Administrative Law Judges feel that the agency discourages the use of subpoenas even though some judges find that to be an effective tool to overcome recalcitrance on the part of some providers. We heard that the agency is reluctant to require hearing offices to adopt best practices such as making claims files available for copying by representatives while they are awaiting assignment even though that seems to help address the problem of late submission of evidence. We also heard that Administrative Law Judges believe that efforts to sanction representatives who do not properly carry out their responsibilities to claimants are routinely not supported by higher management. Whether or not these particular allegations are correct, it does seem that there is fairly widespread perception that the management of the agency is not doing all that it can to provide the leadership and support that is needed to make the current system work better.